United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada

WT/DS236

EXECUTIVE SUMMARY OF THE ANSWERS OF THE UNITED STATES OF AMERICA TO THE 6 JUNE 2002 QUESTIONS OF THE PANEL

June 24, 2002

Questions to Both Parties

1. **Q1:** The record at the time of the Preliminary Determination clearly demonstrates that the vast majority of logs used to make softwood lumber in Canada during the period of investigation were harvested from Crown lands. British Columbia reported that exact figures regarding the volume of softwood logs sent to sawmills were unavailable. However, it stated that *89.5 percent* of the softwood sawlog-grade logs that were harvested during the period of investigation were harvested from Crown land. Quebec reported that *84.7 percent* of the softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Ontario reported that *93.2 percent* of softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Alberta reported that *98.5 percent* of softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Saskatchewan reported that *88.5 percent* of softwood logs that were harvested and sent to sawmills during the period of investigation were harvested from Crown land. Finally, Manitoba reported that 546,667.52 cubic meters of softwood logs were harvested and sent to sawmills from Crown land during the period of investigation. Manitoba indicated that it did not have data regarding the size of the harvest on private or federal land, but stated that Crown land accounted for *95 percent* of the forested land in the province. In calculating the amount of the subsidy benefit, the Commerce Department only included those logs harvested from Crown land.

2. **Q2:** The record evidence at the time of the Preliminary Determination unequivocally demonstrates that the harvesting of Crown timber without a tenure contract or license is prohibited by law in each of the Canadian provinces producing lumber subject to the investigation. The British Columbia Forest Act provides that rights to harvest Crown timber may only be granted in accordance with the Forest Act and specifies the types of tenure contracts under which harvesting rights may be granted. The Quebec Forest Act forbids any person to "carry on a forest management activity" without a forest management permit, and defines these activities to include "timber felling and harvesting." The Ontario Crown Forest Sustainability Act provides that no person may conduct any forest operations except in accordance with a forest management plan approved by the Minister. The Alberta Forest Act provides that no person may cut "any forest growth on forest land" without the permission of the Minister, and that the Minister may dispose of Crown timber only under one of the three forms of tenure in Alberta. The Saskatchewan Forest Resources Management Act provides that no person may "harvest forest products except in accordance" with the Act and its regulations governing licenses required to harvest or operate a wood processing facility. Finally, the Manitoba Forest Act states that timber cutting rights may only be granted under the authority of the Minister, and that no person may cut or remove timber without a license.

3. **Q3:** The record at the time of the Preliminary Determination demonstrated the following with regard to processing requirements imposed on tenure holders in British Columbia: (1) by law, all logs harvested from Crown land must be used in British Columbia or manufactured into lumber or another approved wood product in British Columbia; (2) by law, four tenure types are limited to licensees who own wood processing facilities. More than 83 percent of the British Columbia softwood log harvest that was sent to sawmills was harvested under these four tenure types. Eight percent of the Crown softwood timber harvest was provided to entities for which the evidence was not conclusive as to whether the tenure holders were required to own mills. Only 9 percent of the British Columbia Crown softwood timber harvest was provided to licensees under

tenures normally reserved for entities not owning wood processing facilities; and (3) the sample licenses provided by British Columbia indicate that all timber harvested under the license, or an equivalent volume, must be processed in the wood processing facility named in the license.

4. The record at the time of the Preliminary Determination demonstrated the following with regard to Quebec: (1) the Quebec Forest Act states that "[a]ll timber harvested in the public domain, whatever the nature or object of the management permit authorizing the harvesting, must be completely processed in Quebec;" (2) the same Act limits eligibility for Timber Supply and Forest Management Agreements ("TSFMAs") to entities authorized to construct or operate wood processing facilities, and timber harvested under TSFMAs accounts for 99 percent of the Crown softwood timber harvest in Quebec; and (3) the sample TSFMA provided by Quebec states that the license holder is granted authority to harvest "for the purpose of supplying its plant," and that the tenure holder is required to "[p]rocess all wood harvested under its forest management permit with a view to using it at the plant identified in the preamble to this Agreement."

5. The record at the time of the Preliminary Determination demonstrated the following with regard to Ontario: (1) by law, all timber licenses are "subject to the condition that all trees harvested shall be manufactured in Canada into lumber, pulp, or other products;" (2) Ontario's questionnaire response stated that "[g]enerally, in order to obtain any type of license, an applicant must either own a forest resource processing facility or must have a market to supply wood to some type of forest resource processing facility;" and (3) Ontario's questionnaire response stated that the typical license "directs that the forest resources harvested pursuant to that license should be used to supply the forest resource processing facility owned by the license holder identified in the license, as well as other mills with commitments to receive wood from that license area." The Ministry of Natural Resources requires tenure holders to sign agreements (i.e., wood supply agreements) with the mills to supply the mills with timber.

6. The record at the time of the Preliminary Determination demonstrated the following with regard to Alberta: (1) by law, logs from public land may not be transported outside the province of Alberta without the permission of the Minister; (2) the sample tenure contract provided by Alberta requires the tenure holder to construct "a veneer plant within the vicinity of Rocky Mountain House, Alberta" within two years, to upgrade the plant within five years, to complete "the current expansion to its sawmill/planer mill at Sundre, Alberta" within 18 months and to expend a specified, minimum sum on the veneer mill construction and upgrade and on the sawmill expansion; and (3) while there are no generally applicable legal requirements that tenure holders process the timber obtained under the tenure in their own facilities, provisions in individual tenure contracts are designed to achieve that objective.

7. The record at the time of the Preliminary Determination demonstrated that Saskatchewan limits harvesting rights and the right to operate wood processing facilities to holders of approved licenses for each, and Saskatchewan has entered into four forest management agreements with entities, all of which own sawmills. These four agreements account for 86 percent of the Crown softwood sawlog harvest in Saskatchewan. Furthermore, 9 percent of the Crown softwood sawlog harvest was provided to other tenure holders who own sawmills. Thus, as much as 95 percent of Saskatchewan Crown softwood sawtimber was provided to entities that also hold

provincial licenses to operate sawmills. While by law the agreements must include a requirement to "utilize the licensed volume or area," Saskatchewan did not provide any sample agreements.

8. The record at the time of the Preliminary Determination demonstrated that in Manitoba the Minister is authorized by law to grant Forest Management Licenses ("FMLs") "[w]here the investment in a wood-using industry established or to be established in Manitoba is sufficient to require the security of a continuous timber supply." In fact, all FMLs own sawmills, and FMLs account for 49 percent of the softwood logs harvested in Manitoba. Furthermore, as much as an additional 46 percent of the harvest was provided under other tenures to entities that do, in fact, own wood processing facilities.

9. **Q4:** The *New Shorter Oxford English Dictionary* defines "timber" as "[t]he wood of large growing trees able to be used for structural purposes" and "the trees themselves." The United States has used the term in both of these ways. "Logs" are felled trees or sections of felled trees that may have been delimbed or debarked, but have not been further processed into another end product. "Sawlogs" are logs that are suitable for sawing into lumber or logs that in fact are sawn into lumber. "Lumber" refers to sawn wood products (usually with at least two parallel sides) such as structural or framing lumber, flooring, or siding. The United States has used the term "softwood lumber" more precisely to refer to any lumber product within the scope of the subject merchandise in this investigation. "Stumpage" can mean: (1) "standing timber"; (2) "the value of standing timber"; (3) "a license to cut timber"; or (4) "the fee paid for the right to cut timber." The United States has used this term to refer to standing timber. "Stumpage rates" refers specifically to the fee paid for timber. The United States has used this term to refer to the rates charged by the provincial governments for Crown timber. "Stumpage programs" are the legal regimes through which the provinces provide provincially owned timber. "Stumpage practices" is not a term used by the United States. As used by Canada, the term appears to be synonymous with stumpage programs.

10. **Q5:** Ontario stated in its questionnaire response that "[g]enerally, in order to obtain any type of license, an applicant must either own a forest resource processing facility or must have a market to supply wood to some type of forest resource processing facility." Ontario also stated that the typical license "directs that the forest resources harvested pursuant to that license should be used to supply the forest resource processing facility owned by the license holder identified in the license, as well as other mills with commitments to receive wood from that license area." In Ontario, in order to build a wood processing facility such as a sawmill, a mill must identify available timber on Crown lands and sign a wood supply commitment letter with the Ministry of Natural Resources to receive the timber. In turn, the Ministry requires tenure holders to sign agreements with the mills to supply the mills with timber. Since all tenure holders appear to be required by their licenses to use the harvested timber either in their own wood processing facility or in a defined wood processing facility within the license area for which a pre-existing contract exists, the evidence indicates that any "third party" purchases of logs are largely, if not entirely, mandated transfers of logs from tenure holders to the mills named in their license.

11. **Q6:** In the Preliminary Determination, benchmarks for three of the six provinces investigated by the Commerce Department were based entirely on stumpage rates from public

lands where export restrictions apply. The Commerce Department found that (1) stumpage rates from public lands were based on open, competitive sales; (2) sales from public lands accurately reflected the market price available to U.S. and Canadian purchasers because they constituted a minority of sales in the United States and were driven by the majority of sales in the United States, which consist of open, competitive sales from private lands; and (3) the Department would continue to seek private sales data as the investigation proceeded towards the final determination.

12. **Q7:** There is no record evidence on the volume of log imports from the United States that are processed in Canada and re-exported as lumber to the United States. U.S. government statistics, however, demonstrate that U.S. exports of softwood logs to Canada during 2000 totaled 2,476,000 cubic meters. The U.S. statistics by port of exit indicate that a large majority of those exports (approximately 75 percent) are from the Eastern United States. Data from Quebec companies that requested exclusion indicate that most of those exports likely went to mills in Quebec. With respect to lumber exports, approximately 50 percent of Canada's lumber production is exported to the United States. No aspect of the Commerce Department's analysis was dependent on the level of Canadian imports of logs from the United States that was re-exported to the United States as lumber.

13. **Q8:** British Columbia reported that the total Crown harvest in fiscal year 2000-01 was 94 percent of the annual allowable cut ("AAC"). By law, major licensees must ensure that between 50 percent and 150 percent of their allocated cut is harvested in any given year, and that between 90 percent and 110 percent of their allocated cut is harvested over a five-year period. Quebec reported that the total Crown harvest in fiscal year 2000-01 was 89.3 percent of the AAC. By law, the Minister may reduce a tenure holder's AAC after a five-year interval if the tenure holder has not made full use of its prior allotment. Ontario reported that the total Crown harvest was 79.2 percent of the AAC. By law, the Minister may amend the license based upon the "business requirement" of the licensee. The sample license provided by Ontario states that the amount of timber actually harvested shall be considered a "business requirement" for purposes of that statutory provision and explicitly states that the Minister may reduce a tenure holder's AAC after a five-year interval if the tenure holder has not made full use of its prior allotment. Alberta reported that the total Crown harvest in calendar year 2000 was 104.5 percent of the AAC. According to Alberta, salvage operations following severe fires in 1998 and 1999 account for the temporary authority to harvest more in each of the years from 1998 to 2000 than would normally be allowed. By law, the Minister may suspend or cancel a timber license or quota if the tenure holder harvests more or less timber than authorized during a five-year period. Saskatchewan reported that the total Crown harvest in fiscal year 2000-01 was 68.8 percent of the AAC. Tenure holders are required by law to prepare plans describing the amount of timber to be harvested and to follow those plans as a condition of remaining in compliance with their licenses. Finally, Manitoba reported that the total Crown harvest in fiscal year 1999-2000 was 34.6 percent of the AAC. The record evidence did not indicate what, if any, provincial cut requirements exist.

Questions to the United States

14. **Q9:** The Commerce Department rejected the use of stumpage prices for timber on private land in Canada because the evidence demonstrates that the provincial tenures drive the prices for

those private timber sales. The impact of the provincial tenures on private prices was the only government action considered in this analysis.

15. **Q10(i):** The United States position is precisely as it was stated in the quoted U.S. response, i.e., "if the government made the financial contribution to an entity that does *not* produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that *does* produce the subject merchandise."

16. **Q10(ii):** The ordinary meaning of an "arm's-length" transaction is one in which the parties are unrelated and neither party is under any outside control or influence, either from the party with whom they are bargaining, or other parties.

17. **Q10(iii):** In an aggregate case, if there is a financial contribution to an entity that does not produce the subject merchandise, it would be necessary to analyze whether that financial contribution benefitted another entity that does produce the subject merchandise. Canada's allegation of a financial contribution to an entity that does not produce the subject merchandise is based on its unsubstantiated assertion that there is a significant volume of Crown timber that the provincial governments provide to independent loggers who then sell the timber at arm's-length to lumber mills. Canada's assertion concerning independent loggers is not, however, supported by the record at the time of the Preliminary Determination. Moreover, Canada did not assert this claim until one day before the Preliminary Determination.

18. **Q10(iv):** The United States agrees that countervailing duties may not be imposed in excess of the subsidy found to exist. The Commerce Department calculated the benefit on an aggregate basis and the record at the time of the Preliminary Determination did not indicate that any significant amount of Crown timber was provided to independent entities that did not produce subject merchandise. Canada did not argue to the contrary until one day prior to the Preliminary Determination. The Commerce Department did not, therefore, examine the issue of pass-through in the Preliminary Determination.

19. **Q11:** The U.S. position is that, consistent with Article 19.3, "[a]ny exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter." The provision speaks for itself. The United States has established that Section 751 of the Tariff Act of 1930, as amended, provides the United States with ample discretion to implement its obligations under Article 19.3. Moreover, *even if* Canada's characterization of the Article 19.3 obligations were correct, Section 751 of the Act provides the United States with ample discretion to implement such obligations.

20. **Q12:** Article 19.3 speaks for itself. In addition, it is uncontested that *no expedited reviews have been requested or refused in any prior case*. Moreover, Canada has acknowledged that the Commerce Department has offered exporters an opportunity to request expedited reviews in this case; none of those requests has been denied. If a Member's law provides discretion to authorities to act in a WTO-consistent manner, established WTO jurisprudence dictates that the

law, as such, does not breach the Member's WTO obligations. Refraining from further review in such cases avoids unnecessary adjudication and respects the presumption that Members will implement their obligations in good faith. This is Canada's third attempt to reverse that presumption in connection with the lumber dispute. U.S. law, however, unquestionably provides the United States with ample discretion to implement its obligations under Article 19.3 of the SCM Agreement, even as those obligations are characterized by Canada. There is therefore no basis for Canada's claim that U.S. law is inconsistent with the SCM Agreement, and the United States is entitled to the presumption that it will implement its obligations in good faith. In seeking to answer the question of whether the United States *would* breach Article 19.3 *if*, at some point in the future, it were to exercise its discretion in a specified manner, Canada is merely requesting an advisory opinion on a non-existent measure not before the Panel. The United States notes that this issue was central to the *Section 129* panel report, which was issued to the parties on June 12, 2002 but remains confidential. The United States urges the Panel to review the report when it becomes available.

21. **Q13:** What the United States refers to as an "administrative review" is an annual assessment proceeding. Section 751(a) of the Act states that the Commerce Department shall, upon request, conduct an annual administrative review to determine the rate of duty to be assessed on entries during the preceding year. U.S. law requires such proceedings, upon request, in all cases, including aggregate cases. Article 21.2 of the SCM Agreement does not address assessment proceedings. It instead requires reviews to determine "whether the continued imposition of the duty is necessary to offset subsidization." The Commerce Department has the discretion to conduct reviews to determine whether continued imposition of the duty is necessary to offset subsidization and, if not, to revoke the countervailing duty order. While those provisions of the statute and regulations are not before the Panel, we note that they are applicable in all cases, including aggregate cases. Moreover, even if Canada were correct that Article 21.2 does require administrative reviews, Section 751(a) of the Act gives the Commerce Department ample discretion to conduct such reviews.

22. **Q14:** Canada's request that the Panel make the "findings" listed in paragraph 95 of its second submission amounts to no more than a request that the Panel issue an advisory opinion regarding hypothetical future requests for expedited reviews. The United States has demonstrated that the first requested finding is wrong as a matter of fact and Canada has failed to establish this alleged finding in this proceeding. The second finding the United States has already addressed and shown that it does have sufficient discretion under U.S. law. The last two requested "findings" are prospective in nature and outside the terms of reference of this Panel.

23. **Q15:** The Commerce Department has the discretion to conduct administrative reviews or changed circumstances reviews on a company-specific basis and to establish duty rates on a company-specific basis. Any exploration of how the Commerce Department will exercise its discretion in a hypothetical future administrative or changed circumstances review would improperly go beyond the boundaries of the existing dispute. The United States respectfully requests that the Panel not address legal issues not implicated by measures in this dispute, and it again commends to the Panel the approach taken in the forthcoming *Section 129* panel report.

24. **Q16:** The Commerce Department's initial questionnaire asked each province to provide the "average prices paid for U.S.-origin softwood logs . . . by species . . . and quality." The provincial governments, however, provide timber at the stump (i.e., standing trees), not "roadside" (i.e., as logs). A stumpage price is analogous to an ex-factory price. The benchmark must, therefore, also be an ex-factory (i.e., stumpage) price. One could derive a stumpage price from import prices for logs, but it would be far more complex and, in all likelihood, less accurate, than using an actual stumpage price. U.S. timber is commercially available to Canadian lumber producers, and Canadian lumber producers may, and do, purchase U.S. timber at the stump as well as in the form of logs. Furthermore, the United States is the only country from which Canada purchases a significant amount of timber, either standing timber or logs.

25. **Q17:** Provincial timber is provided at the stump. The most appropriate benchmark for provincial stumpage prices, therefore, is a market stumpage price. Log prices themselves could not be compared to stumpage prices, but log prices could possibly be used to derive a stumpage price. In this case, that is not necessary, because actual stumpage prices commercially available to Canadian lumber producers are available. The cost to the government of providing the timber is not an appropriate measure of the adequacy of the remuneration. WTO panels and the Appellate Body have repeatedly and properly rejected a cost to government benchmark. Canada also cited to three unique cases in which, because there were no commercially available market benchmark prices, the Commerce Department measured the adequacy of remuneration through an analysis of whether the government prices were consistent with market principles. Canada fails to note, however, that the Commerce Department conducted such an analysis in those cases only because there were *no* market benchmark prices available, from either domestic sources or commercially available imports.

26. **Q18:** The United States erroneously included a reference to subparagraph "(d)" in the first line of paragraph 15 of its second written submission. The United States was pointing out that Article 14 in its entirety (not Article 14(d) specifically) "does not purport to address every conceivable scenario in which benefit must be determined." The guideline in Article 14(d) establishes a criterion that any methodology for determining the adequacy of remuneration must meet. Any reasonable measure consistent with the stated guidelines is permissible. The United States agrees that the relevant "prevailing market conditions" are those in the country of provision, not some other country. Where the United States and Canada differ is over what type of evidence constitutes evidence of prevailing market conditions in the country of provision, which Article 14(d) does not address. In Canada's view, evidence of prevailing market conditions in Canada consists solely of transactions for domestic goods. The United States disagrees. "Prevailing market conditions" are the commercial conditions under which goods are bought and sold in the country of provision. A plain reading of the text would indicate that "prevailing market conditions" include the existence of all sources for the good in question that are commercially available to purchasers in the country of provision, including imports. Since U.S. stumpage is commercially available to lumber producers in Canada, it constitutes part of the prevailing market conditions in Canada.

27. **Q19:** The United States confirms the statement it made. A market may be small but nevertheless robust and driven by market forces. Such a market would produce prices that could

serve as a benchmark for determining the adequacy of remuneration. The issue is not the size of the "market" *per se*, but rather what the "market conditions" encompass. In particular, "market conditions" encompass the total commercially available supply, including imports. In the Commerce Department's preliminary analysis, while the overall size of the market was not a consideration, the relative size of the government-controlled segment of the market for Canadian stumpage relative to the private segment of the market was a consideration. The provincial governments control approximately 90 percent of the Canadian softwood timber supply. The relative size of the government's segment of the market is particularly significant because provincial tenure holders consistently harvest less than their AAC and, if necessary, a tenure holder may harvest in excess of its AAC. Canadian lumber producers, therefore, have little or no incentive to purchase private stumpage, unless the private seller is willing to meet, or better, the government's administratively set stumpage price. Thus, the government's overwhelmingly dominant share of the market for stumpage drives private stumpage prices toward an equilibrium with government prices. This was confirmed by other record evidence.

28. **Q20:** There does not appear to be any record evidence to support Canada's claim that swaps must be equivalent in value as well as volume. Tenure holders are generally not permitted to sell the timber they harvest. "Swaps" generally involve two mills that are required under their tenures to process all the timber they harvest or an "equivalent quantity" in their mill. Thus, the provincial laws themselves place a premium on the *quantity* exchanged, not the value. The existence of the "equivalent quantity" language in the provincial statutes is tacit recognition of the occasional need for swaps to meet specific input requirements. The primary factors in swaps are volume and the physical characteristics of the logs, not value. Moreover, swaps are between sawmills. In an aggregate benefit calculation, where both parties are producers of the subject merchandise, the value of the logs swapped and the nature of the transaction are irrelevant because the benefit is calculated based on the total volume of Crown timber going into lumber production, allocated over all sales of softwood lumber.

29. **Q21:** Adequate remuneration must be determined in relation to prevailing market conditions in the country of provision, consistent with Article 14(d). No amount of evidence could overcome this express requirement. If the Panel is asking what amount of evidence is needed in order for an investigating authority to reject prices for domestically produced goods in favor of prices available in the domestic market for foreign-produced goods, it is the view of the United States that Article 14(d) is not concerned with whether the benchmark is based on domestically produced goods versus commercially available imported goods, but rather with whether the benchmark reflects the prevailing market conditions facing the purchaser in the country of provision. It is purely an evidentiary matter whether domestically produced goods versus commercially available imported goods represent the appropriate benchmark.

30. There may be instances where a government has a monopoly on a particular good. In this instance, the logical alternative would be to test the government price against a commercially available import price. Even Canada concedes that import prices could be utilized in the case of a government monopoly. Where a government does not maintain a monopoly, but exercises overwhelming dominance in the market, the same considerations would apply. Across all of Canada, a *single* government supplier controls on average 90 percent of the supply of timber.

The remaining 10 percent of supply is provided by *thousands* of small, private landowners. It is impossible to conclude that the private landowners have any market power whatsoever.

31. A benchmark based on foreign-produced goods must be *commercially available* to the domestic purchasers in the country of provision. Thus, it would be inappropriate to choose a world market price from Latvia, Russia, Japan, Europe or Chile as a benchmark for stumpage in Canada. Canadian lumber producers do not import timber from these countries, and only actual or potential import prices could conceivably satisfy the commercially available requirement. The only country that Canada does import timber from is the United States. Proof of actual imports is the strongest possible evidence that a price is commercially available to domestic purchasers in the country of provision.

32. Finally, the benchmark for measuring adequate remuneration must itself be a *market* price, whether the benchmark stems from domestically produced goods or from commercially available imported goods. Thus, the Commerce Department did not seek to demonstrate that the U.S. market was "more competitive" than the Canadian market for stumpage. Rather, the Commerce Department found that the U.S. stumpage market is open and competitive and the prices, therefore, are "market" prices.

33. **Q22:** Article 20.l establishes a general rule of prospective application for both provisional measures and definitive duties, subject to the exceptions in Article 20. Article 20.6 defines a set of circumstances under which retroactive assessment is permitted. The reference to exceptions in Article 20.1, including the Article 20.6 exception, should, logically, be interpreted to include within the exception the provisional measures essential to preserving the possibility of such a remedy where there is evidence that the requisite circumstances exist. Nothing in Article 20.6 precludes such a reading of Article 20.1. The reference to "provisional measures" in Article 20.6 is used solely to fix a point in time from which to calculate the 90-day retroactivity period and thereby define a universe of entries that may be subject to retroactive assessment. The fact that the date on which provisional measures are applied is used to calculate the 90-day period does not preclude subjecting the universe of entries during that period to provisional measures.

34. **Q23:** The timing provisions of Article 17 address the point in a proceeding at which provisional measures can be imposed. That point occurs after affirmative preliminary determinations of subsidization and injury have been made, *and* no earlier than 60 days after initiation. Article 20 addresses the universe of entities to which those measures may be applied.

35. **Q24:** Provisional measures were imposed for 4 months, i.e., they were ordered on August 17, 2001 and terminated on December 15, 2001.

36. **Q25:** The U.S. International Trade Commission ("ITC") does not conduct an analysis of "injury which is difficult to repair" until it makes the final injury determination. As the panel concluded in *Hot-Rolled Steel from Japan*, conducting such an analysis at the preliminary stage would be speculative. In contrast, the existence of massive imports and a subsidy inconsistent with the Agreement are comparatively straightforward analyses of facts. The ITC's preliminary injury determination, together with the evidence concerning prohibited subsidies and massive

imports, constitutes sufficient evidence to take the limited step of imposing provisional measures retroactively, pending the outcome of the full investigation.

37. **Q26:** Article 20.3 states that "[i]f the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected." If there is no cash deposit or bond, the amount guaranteed is zero. It follows that, absent provisional measures in the form of a deposit or bond for entries during the 90-day retroactivity period, no definitive duties may be collected on those entries. The conflict between Articles 20.3 and 20.6 does not exist if Article 20.1 is interpreted to permit provisional measures where there is sufficient evidence that critical circumstances exist.

38. **Q27:** In the Preliminary Determination, the Commerce Department issued a single order imposing provisional measures. The universe of entries subject to that order included all entries made or on after 90 days prior to the Preliminary Determination. Moreover, under U.S. law, entries during the 90-day retroactivity period are subject to the provisional measures cap. If the Panel should find that there are two such periods, the rules governing provisional measures cannot apply to the 90-day retroactive assessment period. If Article 20.6 only addresses assessment, not provisional measures, then the 4-month limitation on provisional measures and the provisional measure cap do not apply to such assessments.

Questions to Canada

39. **Q36:** Canada has *de facto* abandoned its specificity claim in this proceeding. Any attempt by Canada to pursue its specificity claim at this late stage would deny the United States its right to defend its interest and the rights of third parties to be heard.

40. **Q37:** If Canada is still pursuing this claim, it would not be appropriate at this late stage for Canada to supplement its prior submissions with additional information or argument. The U.S. right to defend its interest would be severely prejudiced in such a case.